



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MAR 03 2005

Burton Cohen

New Castle, NH 02884

RE: MUR 5646

Dear Mr. Cohen:

On February 3, 2005, the Federal Election Commission found that there is reason to believe you knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") and the Commission's regulations. These findings were based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2). The Factual and Legal Analysis, which more fully explains the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this order. If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in

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Burton Cohen
Page 2

settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Dawn Odrowski, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Vice Chairman

Enclosures

Factual and Legal Analysis
Procedures
Designation of Counsel Form

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Burton Cohen

MUR 5646

I. GENERATION OF THE MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2).

II. FACTUAL AND LEGAL ANALYSIS

A. Background

On June 10, 2004, Burton Cohen abruptly dropped out of the U.S. Senate race in New Hampshire reportedly due to "a campaign situation beyond his control." Beverley Wang, *Cohen Not Saying Why He Quit*, The Associated Press State & Local Wire, June 11, 2004 available at LEXIS, News & Business Library. News reports referred to accounts by campaign staff and others that a "significant" amount of campaign cash was missing and that the campaign manager had left town. *Id.* and *Campaign Money Missing*, The Union Leader (Manchester NH), June 12, 2004 at A1, available at LEXIS, News & Business Library. At a June 16, 2004 press conference, counsel hired by the Committee attributed Mr. Cohen's decision to drop out of the race in large part to "some concerns that have been raised in the past week about the accuracy and completeness of transactions disclosed" on reports the Cohen's principal campaign committee, Cohen for New Hampshire ("the Committee") had filed with the Commission. *Lawyer: Cohen, Campaign Victimized*, The Union Leader (Manchester NH), June 16, 2004 at A1, available at LEXIS, News & Business Library.

1 Information in the Commission's possession provides a picture of events that led to
2 Burton Cohen's withdrawal from the race and Campaign Manager Jesse Burchfield's departure.
3 Committee Finance Director Ellen Stankiewicz, who began working full-time with the campaign
4 in March 2004, had concerns about the campaign and Burchfield's performance and had
5 numerous confrontations with him despite her relatively short tenure. Stankiewicz spoke with
6 Cohen on June 3, 2004 about replacing Burchfield and contacted national finance director Kelly
7 Bjorkland to search for a new campaign manager. An interview with a prospective applicant was
8 scheduled for June 7, 2004. The evening before the interview, Stankiewicz brought the
9 applicant's resume with her to a meeting with Cohen. Cohen has acknowledged that Burchfield
10 was having problems managing some employees.

11 Burchfield's behavior around the time of these discussions suggests that he may have
12 suspected his job was in jeopardy. On June 4, the day after Stankiewicz's first discussion with
13 Cohen about replacing Burchfield, Burchfield disappeared from the office for hours, and he
14 looked "somber" and "defeated" when he was in the office. On June 7, the day of the scheduled
15 interview with Burchfield's potential replacement, Burton Cohen and others at the campaign
16 received an e-mail from Burchfield stating that the campaign was broke and he was leaving to
17 take a non-political job in Memphis, Tennessee. Following receipt of the e-mail, two campaign
18 staffers went to Burchfield's apartment and found the door open and most of his belongings
19 gone.

20 At Stankiewicz's urging, Cohen called the bank to check the balance of the Committee's
21 accounts as of June 7, 2004 and learned that the accounts contained about \$15,000. Until then,
22 Stankiewicz had believed the campaign had about \$350,000. The last Committee disclosure
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1 report filed prior to Burchfield's departure showed cash on hand of about \$397,000 as of
2 March 31, 2004.

3 Publicly available information and information obtained by the Commission in the
4 ordinary course of carrying out its supervisory responsibilities indicates that there is reason to
5 believe that candidate Burton Cohen knowingly and willfully violated the Federal Election
6 Campaign Act of 1971, as amended ("the Act"), and Commission regulations by spending funds
7 from his state campaign in connection with his federal election.

8 **B. Use of Non-Federal Funds to Pay for Federal Campaign Activity**

9 The Act, as amended by the Bipartisan Campaign Reform Act of 2002, prohibits a federal
10 candidate, a candidate's agent, and entities established, financed, maintained or controlled by, or
11 acting on behalf of, a candidate from soliciting, receiving, directing, transferring or spending
12 funds in connection with a Federal election unless the funds are subject to the limitations,
13 prohibitions and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A). Moreover,
14 Commission regulations specifically prohibit transfers of funds or assets from a candidate's
15 account for a non-federal election to his or her principal campaign committee for a federal
16 election. 11 C.F.R. § 110.3(d). Both provisions are designed to prevent the use in federal
17 elections of funds raised outside the limits and prohibitions of the Act and to ensure that all funds
18 used in federal elections are reported.

19 New Hampshire state law permits individuals and political committees to make
20 contributions of up to \$1,000 to a candidate who has not agreed to voluntarily limit campaign
21 expenditures. N.H. Rev. Stat. Ann. § 664:4, V. Corporations are also permitted to contribute
22 within that limit based on a 1999 U.S. District Court decision ruling that New Hampshire's
23 prohibition on corporate contributions was unconstitutional. *See Kennedy v. Gardner*, 1999 WL

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1 814273 (D.N.H. Sep 30, 1999) (No. CV 98-608-M) and Opinion Letter dated June 6, 2000 from
2 Deputy Attorney General to William M. Gardner, Secretary of State, at
3 <http://www.sos.nh.gov/political%20page.htm>. The New Hampshire Secretary of State's Office
4 has advised us that Cohen did not agree to limit campaign expenditures in his 2002 state senate
5 election.

6 According to Jesse Burchfield, leftover funds from Burton Cohen's state senate campaign
7 were used to pay for expenses related to Cohen's federal campaign and Cohen signed all of the
8 checks written on the state account(s). Burchfield specifically identified two instances in which
9 state funds financed federal activity: payment(s) to Cunningham, Harris & Associates, a
10 consulting firm, and the purchase of office furniture used by the Committee. Indeed, Burchfield
11 attributed the Committee's misreporting in part to the fact that state campaign funds were
12 improperly used to pay federal campaign expenses, and thus, could not be reported.

13 Ellen Stankiewicz has confirmed that state campaign funds were used to pay for federal
14 election expenses, although she identified the state-financed expenses as consisting chiefly of
15 salary payments. As part of her research into Burchfield's activities after he resigned,
16 Stankiewicz learned that state campaign funds were used to pay Burchfield's and Sharon
17 Valdez's salaries for duties related to the federal campaign and for Burchfield's housing stipend.

18 State campaign disclosure reports, signed by Cohen, lend support to Stankiewicz's
19 statement that state funds were used to pay Burchfield and Valdez's federal campaign salaries
20 and their housing costs.¹ The state campaign reports reflect a \$35,000 surplus following Cohen's

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¹ New Hampshire state law requires candidates for state office who make expenditures exceeding \$500 to file and sign statements of receipts and expenditures together with the candidate's designated fiscal agent. N.H. Rev. Stat. Ann. §§ 664:7 and 664:12. Candidates are not required to set up a separate political committee, and, according to the New Hampshire Secretary of State's Office, Burt Cohen did not do so in 2002.

1 November 5, 2002 reelection to the state senate. From this surplus, the campaign reported
2 \$12,750 in "staff" payments to Burchfield and Valdez and an \$1,800 payment to a third party for
3 "rental space" between November 15, 2002 and January 31, 2003.² Although some of the earlier
4 payments to Burchfield could have been for his work as Cohen's state campaign manager during
5 the campaign and as the campaign wound up its activities, Cohen had publicly announced that he
6 would explore a bid for the U.S. Senate as early as December 4, 2002. *See Campaigns of 2004*
7 *New Hampshire Senate: Never Take the Underdog for Granite*, The Hotline, December 5, 2002.
8 *available at* Westlaw, 12/5/2002 APN-HO 22. Viewing the timing of the payments together
9 with Stankiewicz's statement, it appears that, at a minimum, staff and rent payments of \$8,050
10 made in January 2003 were in connection with Cohen's federal election.³

11 As for Burchfield's statements that state funds paid for consulting services and furniture
12 for the federal campaign, the state campaign's reports do not reflect any payments to
13 Cunningham, Harris & Associates or any payments described as for furniture. However,
14 Cunningham, Harris & Associates did serve as a fundraising consultant to the federal campaign
15 as illustrated by a number of reported disbursements to them appearing in the Committee's 2003
16 April Quarterly Report. If surplus state campaign funds were used to pay Cunningham, Harris &
17 Associates and to purchase furniture, then two scenarios are possible: either the state campaign
18 reports do not accurately reflect to whom disbursements were made, or the state campaign
19 received unreported contributions that were then used to pay federal campaign expenses.

² The payment for rental space was made to John Hoyt, the same person to whom the Committee later made disbursements for "rent - finance director." Also, the relevant state report appears to mistakenly list the wrong year for the November payments. It reflects payments being made on dates in November 2003, but the report itself was filed on May 5, 2003.

³ Burton Cohen filed a Statement of Candidacy for the 2004 U.S. Senate race on January 16, 2003.

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1 New Hampshire's individual contribution limits are below the Act's limits and Cohen's
2 state reports reveal no corporate contributions so it is possible that the state funds used in the
3 federal campaign may have consisted of permissible funds under the Act. Nevertheless, none of
4 the funds were subject to the Act's reporting provisions as required by Section 441i(c)(1)(A).
5 and in any case, 11 C.F.R. § 110.3(d) flatly prohibits a candidate's state campaign from
6 transferring funds to the candidate's federal campaign. Moreover, given Burchfield's statement
7 that state funds were used to pay for expenses that are not reflected in the state campaign reports,
8 the state campaign reports may not accurately list all contributions received and expenditures
9 made by the state campaign.

10 Based on current information, it appears that state funds were used to pay for federal
11 election expenses with checks drawn on a state campaign account(s). According to Burchfield,
12 Burton Cohen signed all checks drawn on the state account(s). Therefore, Cohen spent state
13 campaign funds in connection with his federal election that were not subject to the limitations,
14 prohibitions and reporting requirements of the Act. He also effectively transferred non-federal
15 funds from his state campaign to the Committee. *See* conciliation agreement in MUR 4974
16 (Tiberi for Congress)(candidate's federal and state committees violated 11 C.F.R. § 110.3(d)
17 when his state committee made a contribution to, and incurred expenses on behalf of, his federal
18 committee).

19 Cohen's use of state funds in his federal campaign also appears to have been knowing
20 and willful. Burchfield told Cohen that state funds could not be used in a federal campaign after
21 receiving advice on that issue from a Committee consultant. Cohen apparently "downplayed"
22 Burchfield's advice with "a humorous remark" and wrote checks on the state account for federal

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- 1 campaign expenses anyway. Accordingly, there is reason to believe that Burton Cohen
- 2 knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).

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